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SUPREME COURT OF THE UNITED STATES

ROBERT BAKER,

Petitioner

v.

STATE OF MISSOURI

No. 82-5632

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

On the felony murder question, the issue is clearly drawn. Petitioner asserts that in a capital case where an instruction on another non-capital offense is justified by the evidence, then the unavailability of such an instruction is constitutionally impermissible. Respondent argues that even if such an instruction is justified by the evidence, the trial court must not submit the instruction if the "elements" of the other offense are different from that of the capital offense and if the other is not technically a lesser included offense according to the latest ruling of the Missouri Supreme Court.

The Missouri Supreme Court, in its opinion in the present case, in trying to demonstrate that second degree (conventional) murder is a more appropriate lesser offense to submit to the jury than first degree (felony) murder says, in the passage quotedat page 5 of respondent's brief: ". . . examination of the elements of the homicides, notably the mental states, illustrates that it is second degree murder, not first degree murder, which would sufficiently test a jury's belief of the crucial facts for a conviction of capital murder." The court gives no explanation for this conclusion. First degree murder and second degree murder are not essentially different in their requirement of a mental state, since neither of them requires deliberation. The facts in this case fit much more closely to first degree murder than to second degree murder, because the murder was in fact committed in the perpetration of or in the attempt to perpetrate a major felony mentioned in the first degree murder statute, sec. 565.003, R.S.Mo., namely robbery. The case cited on this point by the court has no apparent

relevance. We think that it is entirely apparent that petitioner's argument is in line with Beck v. Alabama, 447 U.S. 625, and that respondent's argument is contrary to the law in that case. Moreover our argument, until the instant case, had the clear approval of the Missouri Supreme Court in a decision passing on this very issue. State v. Gardner, 618 S.W.2d 40 at 41 (1981).

We note that respondent makes no answer to our argument concerning the vacillation of the Missouri Supreme Court in recent cases on the question of what is a lesser included offense in this regard. Yet we believe that this is an important matter. This Court has stated: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358. In the same way, it is of vital importance that the decisions of a state supreme court regarding the death penalty be, and appear to be, fair and consistent, and should not consist of erratic and contradictory rulings--one day withholding the penalty and another day, in a similar case, approving it, in an unpredictable fashion. There are obvious considerations of constitutional due process of law in this decisional inconsistency which require a rejection of the Missouri Supreme Court's judgment and a setting aside of petitioner's sentence.

II

On the second question--whether the trial court erred in not requiring a finding that the petitioner killed the victim or intended to kill him--respondent asserts that the main difficulty with our position is that this claim was made for the first time in our petition for certiorari. It is true that

this is the first time we presented that issue. But we mentioned at page 17 of the petition that the Enmund case was decided after the Missouri Supreme Court took this case under submission and before its ruling. And it is firmly established that a new ruling by this Court applies to any judgment of conviction which was not final on direct review when the new ruling was issued. Linkletter v. Walker, 381 U.S. 618 (1965); United States v. Johnson, ____ U.S. ____, 102 S.Ct. 2579 (1982).

In these circumstances, the Enmund rule is certainly applicable to the case at bar; and this must be so even if the issue was not raised in the Missouri Supreme Court. Litigants are not required to anticipate new rules; but new rules are necessarily applicable to appeals taken under submission prior to the inception of the new rules.

III

The Enmund case is also of importance on the matter of mens rea. Enmund demonstrates beyond a doubt that the mens rea must be closely examined in any imposition of the death sentence to determine whether it is cruel and unusual punishment for the particular defendant. 102 S.Ct. at 3376-77.

The mens rea involves the issue of whether it is essential to the submission of the aggravating circumstance here in question that there be proof beyond a reasonable doubt that petitioner knew that the victim was a police officer. This is a matter which is of the utmost importance not only as regards the death penalty, but as regards the very essence of criminal liability--namely, shall an accused be convicted of a specific crime in the absence of an intent to commit that crime?

The Missouri Supreme Court's majority opinion is that this question is not worthy of serious consideration. That much is

entirely apparent. The court refused to rule, and brushes the matter off with a casual comment that in any event there was proof beyond a reasonable doubt that petitioner knew that the victim was a police officer. One alleged basis of this notion is that the victim was shot with his own police gun.

At the risk of unseemly repetition, we again assert that under the prosecution's own evidence it could only have been Leslie Lomax, and not petitioner, who did the shooting if the victim was shot with his own gun. The Missouri Supreme Court did not say that petitioner shot the victim with the victim's own gun. And now the respondent, in his answering brief, does not say that the evidence shows, or implies, that petitioner shot the victim with the victim's own gun. He carefully avoids saying that. (Resp. Br. 8) In fact the evidence as to who shot the victim with the victim's own gun (if indeed that happened at all) is wholly ambiguous and contradictory. Respondent struggles, but leaves only a vague notion. The clear impression is that the respondent--and the Missouri Supreme Court's majority--considers that the petitioner is deserving of the death penalty whatever the evidence may be and whether or not petitioner knew that the victim was a police officer. We think that this is serious error. Punishment must be tailored to the accused's personal responsibility and his moral guilt. Enmund v. Florida, supra, 102 S.Ct. 3368, 3378 (1982).

And so we say that the Missouri Supreme Court's offhand comment that there was proof beyond a reasonable doubt on this matter should not be accepted. But first and foremost there should be an unequivocal and unmistakable ruling by this Court that in order to permit the imposition of the death penalty in this case, there must be clear and convincing proof that the

accused knew that the victim was a police officer, and that there must be a jury finding that the evidence shows this to be true beyond a reasonable doubt.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, James C. Jones, attorney for petitioner Robert Baker, depose and say that on the 21st day of December, 1982 I served a copy of petitioner's reply brief on John H. Morris III and Ms. Kelly Klopfenstein, Assistant Attorneys General, State of Missouri, P.O. Box 899, Jefferson City, Missouri 65102, attorneys for respondent State of Missouri, by depositing said copy in a United States mailbox with first-class postage prepaid.

Subscribed and sworn to before me this 21st day of December, 1982.

Notary Public

My commission expires

ROSEMARY MISLEY
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 11/4/83
CITY OF ST. LOUIS